

11,152

PL-1

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of Exclusion From Competitive Range]

FILE: B-194561

DATE: August 17, 1979

MATTER OF: Western Design Corporation *DLG 0 2584*

DIGEST:

1. No useful purpose will be served by delay in consideration of protest where complete record is before GAO. Protester may request reconsideration on basis of new information if Freedom of Information Act request for awardee's proposal is successful.
2. Timeliness of protest revolves around timeliness of specific bases of protest. Information submitted in support of timely raised bases of protest will be considered. New and independent grounds of protest must independently satisfy timeliness criteria.
3. Protest of alleged informational deficiencies in request for proposals, apparent prior to date set for receipt of initial proposals and first protested well after receipt of proposals, is untimely. Exceptions to timeliness requirements are not applicable where protester has not demonstrated good cause and protest does not raise issues of widespread and significant interest to procurement community.
4. Procuring agency was not obligated to equalize knowledge of some competitors of subject matter of procurement when record shows only that knowledge was result of performance of prior related contracts rather than based on improper transmission of information from Government to protester's competitors.
5. Determination that proposal was outside competitive range was reasonable where record shows substantial support for

~~200177~~

numerous deficiencies assessed in evaluation and proposal would have required major rewrite in order to be satisfactory.

6. There is nothing improper in procuring agency's failure to evaluate information submitted by protester in rebuttal to determination that its proposal was outside competitive range. Submission of additional information amounts to initiation of discussions by protester. Discussions are not required with offeror once proposal is outside competitive range.
7. Contract awarded during interval between denial of protest by procuring agency and filing of protest with GAO was not awarded during pendency of protest.

Western Design Corporation (Western) protests its exclusion from the competitive range under a request for proposals (RFP) issued by the United States Air Force (USAF) Armament Development Test Center (ADTC). For the reasons stated below, we deny the protest.

The RFP in question was issued on September 28, 1978, for the design, fabrication and test of a 30-millimeter ammunition feed system utilizing linear linkless technology. The system was required to be compatible with 30-m.m. guns which fire the PGU-13, 14, 15 (GAU-8) ammunition and with contemporary aircraft of which the A-10 aircraft was selected as the example for consideration by prospective contractors; the feed system was not actually to be installed in the A-10 as part of this procurement. The RFP contemplated the award of a fixed-price incentive-type contract. Three firms submitted proposals by the November 21, 1978, closing date for receipt of proposals.

On February 28, 1979, ADTC advised Western by letter of the deficiencies which ADTC had found in Western's technical proposal and notified Western that it had been excluded from the competitive range. By letter dated March 7 to ADTC, Western protested its exclusion from the competitive range, alleging that the evaluation of its proposal was not impartial, that the evaluation

criteria were not properly applied, and that ADTC was systematically endeavoring to exclude small businesses. ADTC denied Western's protest by letter date stamped as received by Western on March 30, 1979. The contract was awarded to the Emerson Electric Company on April 6, 3 days prior to the date on which Western's protest was filed with our Office.

Western's protest to our Office incorporated the allegations included in its protest to the ADTC and added contentions that the solicitation did not provide sufficient information to permit Western to prepare a responsive proposal and that other offerors had available to them information which was denied to Western. Western argues that the possession of this information by other offerors imparted an unfair competitive advantage.

Western has asked that we delay consideration of its protest while it seeks release of the awardee's proposal through a Freedom of Information Act (FOIA) request to the Air Force. Western contends that access to Emerson's proposal will provide the information it needs to show that its competitors were provided information which was denied to Western. As we discuss, infra, it is not the possession of superior knowledge of the subject matter of a procurement which might demonstrate favoritism or unfair treatment, but the source of the information underlying that knowledge. The Air Force furnished us a copy of Emerson's proposal as part of its report on this matter. Since we have a complete record before us, even though some portions thereof may have been denied to the protester, we see no useful purpose to be served by delay in our consideration of this matter. Western may, if its FOIA request is successful, request reconsideration of our decision on the basis of the new information provided. See discussion in Systems Research Laboratories, Inc. - Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341.

The threshold question for our consideration is the timeliness of Western's protest under our Bid Protest Procedures, 4 C.F.R. part 20 (1979). Western first contends that its protest should be considered timely because it complied with the spirit and intent of our

procedures by protesting immediately upon becoming aware of the improprieties alleged in this procurement and, second, asks that we find Western's protest to fall within the exceptions of 4 C.F.R. § 20.2(c) to the timeliness requirements.

As a general rule, we have considered the timeliness of protests to revolve around the question of the timeliness of the specific bases raised by the protester. See Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412. Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, we have held that these later-raised bases must independently satisfy the timeliness criteria of our Bid Protest Procedures, supra. See Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412. Conversely, where these later-raised bases have merely provided support for an earlier timely objection, we have considered these arguments and/or evidence in our evaluation of the protest. Kappa Systems, Inc., supra.

Our Bid Protest Procedures require that a protest against "alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of proposals." 4 C.F.R. § 20.2(b)(1) (1979). On April 12, 1979, Western filed a detailed statement of the basis of its protest accompanied by supporting papers and a 4-page listing of references, background information, conclusions and enumerated "procurement facts." Western's "procurement facts" incorporate a list of the alleged informational omissions and deficiencies in the RFP, including such things as a failure to describe in detail the A-10 armament bay envelope, GAU-8 gun installation data, GAU-8 ammunition data, and "other data specifically required in order to effect, compose and prepare a competent technical proposal." We think that the bases for these allegations were apparent prior to the date for submission of proposals and should have been protested prior to that date in order to be timely. They were not. Consequently, these bases of protest will not be considered.

Protests against the award of a Government contract are very serious matters. Our Bid Protest Procedures provide an orderly process to insure the equitable and prompt resolution of protests and, as a consequence, must be and are strictly construed and applied by our Office. See Department of Commerce; International Computaprint Corporation, B-190203, August 2, 1978, 78-2 CPD 84. We do not believe that either of the exceptions of 4 C.F.R. § 20.2(c) to our timeliness requirements is applicable here. This section permits consideration of untimely protests where either good cause is shown or where issues of significant interest are raised. Good cause generally refers to some compelling reason beyond the protester's control which prevented it from filing a timely protest; the significant issue exception requires the raising of questions of widespread interest to the procurement community. See Eglen Hovercraft, Incorporated, B-193050, January 22, 1979, 79-1 CPD 39; aff'd, March 14, 1979, 79-1 CPD 179. Western has neither demonstrated good cause nor raised issues of such widespread and significant interest as to warrant application of these exceptions.

There are two separate elements to Western's contention that ADTC condoned an unfair competitive advantage on the part of Western's competitors. First, ADTC was aware that the other offerors (Emerson and General Electric) possessed superior knowledge of the subject matter of the procurement "as a result of information, data and other factual knowledge" systematically denied Western by the Government rather than by virtue of any past contracts. Second, ADTC failed to provide to Western the information necessary to equalize this advantage. In view of our conclusion, infra, we need not discuss the second element mentioned above.

First, we consider whether ADTC was obligated to make allowances for or required to equalize the alleged superior knowledge of Western's competitors. We have long recognized that incumbents or past contractors may enjoy a competitive edge over other offerors. There is no requirement that this advantage be equalized unless it is the result of a preference or unfair action by

the Government. ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34. This rule extends to advantages gained through the performance of other contracts. E-Systems Inc., B-191346, March 20, 1979, 79-1 CPD 192; National Motors Corporation, et al., B-189933, June 7, 1978, 78-1 CPD 416.

Despite Western's unsupported assertions to the contrary, the record shows only that both of Western's competitors had prior contracts involving the GAU-8 gun program. General Electric, for instance, participated in the development of the GAU-8 gun and ammunition; Emerson's proposal indicates that it gained a familiarity with the GAU-8 armament system as the result of performing several related prior subcontracts. We have examined the record carefully, including Emerson's proposal, and have found no evidence which would persuade us that Western's competitors improperly obtained any additional information for this procurement from the Government through any means other than performance of these prior contracts. Consequently, we do not think that ADTC was obligated to equalize these advantages in connection with this procurement.

Our review of Western's objections to the ADTC's evaluation of its proposal is limited to examining whether the ADTC's evaluation was fair and reasonable and consistent with the stated evaluation criteria. It is neither our function nor practice to perform a de novo review of proposals and make an independent determination of their acceptability or relative merit. The determination of whether a proposal is in the competitive range is primarily a matter of administrative discretion and ordinarily will be accepted by this Office, absent a clear showing of unreasonableness. See RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. For a technical evaluation to be deemed unreasonable, the record must show clearly that there was no rational basis for the evaluation. Joanell Laboratories, Incorporated, 56 Comp. Gen. 291 (1977), 77-1 CPD 51.

Western's objections to ADTC's evaluation of its proposal are both specific and numerous. Although we have reviewed all of Western's allegations, we will

omit discussion of some of them and treat here only a representative sample.

ADTC considered Western's proposal to be deficient because Western had not performed the technical analyses necessary to support its figures for the power and load requirements of the mechanical components of the system, to justify its proposed use of an accumulator (a mechanical device to smooth transient peak loads) in the system's chain drive, or to support the proposed system's ability to meet the time-to-rate requirements of the RFP's statement of work (SOW). ADTC also questioned the adequacy of Western's facilities and equipment.

Western stated in its March 7 protest to the ADTC that it had performed the necessary analyses and that ADTC was aware of the methodology used since it had been developed under prior ADTC efforts in which personnel now employed by Western and known to ADTC were the principal contributors. Western notes that its proposal states clearly that its data was formulated using the methods developed under one of these prior contracts. In response to ADTC's concerns regarding the adequacy of Western's equipment and facilities, Western states that the RFP did not require that the prime offeror have all of the facilities to build and test the unit and that during 3 months of proposal evaluation, no inquiries were made concerning Western's ability to perform the contract.

Section D of the RFP, Evaluation Factors for Award, advised prospective offerors that the technical proposal was to establish the offeror's capability and that it should, within the limit of 50 pages, be complete and specific in every detail. Offerors were forewarned that the technical evaluation panel was restricted to considering only the information provided in the proposal and that no assumptions would be made regarding an offeror's capabilities unless they were stated in the proposal. A list of topics to be covered and a general proposal outline were specified.

After examination of Western's proposal, we cannot conclude that ADTC's assessment was unreasonable. Western's estimate of the system's steady state power requirement is noted as having been developed "using

the methodology of AFATL-TR-75-105," one of the earlier contracts mentioned above, and further corrected through the application of data obtained during tests of a similar system for 20-m.m. weapons. No explanation is furnished concerning how the methodology was applied, the computations, or the nature of the corrections attributable to the use of test data.

Western's justification for its proposed use of an accumulator in the chain ladder mechanism incorporates Western's conclusions as to the acceleration of the parts involved in achieving the required time-to-rate and the resulting power requirements and system loads, both with and without the accumulator, without providing any information regarding the analyses underlying these estimates. We note also that one paragraph in this section of Western's proposal states that the computation of these estimates requires comprehensive computer codes which Western possesses but does not indicate or even imply that these codes were employed in the preparation of Western's proposal.

Western's description of its facilities is limited to an estimate of the square footage of its physical plant and its allocation into office and fabrication/testing areas, the square footage of the facilities possessed by its proposed manufacturing engineering subcontractor, advice that Western utilizes the electronic data processing services of Information Systems Design and its Univac 1108 and peripherals, and a statement that Western maintains a large library of programs, codes and routines employing "the latest technology available." No further details, descriptions, or examples are provided of the actual equipment or programs available to Western.

The RFP placed the burden squarely on offerors to provide in their technical proposals sufficient evidence to establish their capabilities and advised offerors that only the information contained in their proposal would be considered. We do not think that Western's proposal provided any concrete basis upon which ADTC could determine whether the figures cited by Western were the product of comprehensive analyses or merely the result of educated guesswork. Similarly, we think the omission

by Western from its proposal of any description, explanation, or examples of the types of equipment or computer programs which it might bring to bear on the problem left ADTC substantially without information concerning the resources which Western could commit to this effort. In these circumstances, we think ADTC's determination that Western's proposal was deficient with respect to these factors was reasonable. See Teledyne Inet, B-180252, May 22, 1974, 74-1 CPD 279.

Western's contention that the RFP's evaluation criteria were inconsistently applied to its proposal is premised on what Western asserts are contradictions in ADTC's evaluation. As an example of these inconsistencies, Western refers to two statements in ADTC's letter of February 28 as follows: (1) "WDC does not state who will build the system and what spares might be needed," and (2) "you propose that the entire fabrication be subcontracted to VERC0 Industries." We note, however, as does ADTC, that the apparent inconsistency between these sentences diminishes when they are read in context. The second sentence lies in a paragraph addressing Western's apparent lack of facilities which goes on to note that Western does not explain the working relationship between itself and VERC0 Industries and notes that Western only "anticipates" subcontracting with VERC0. We regard the first sentence noted above not as contradictory but as consistent with the uncertainty reflected in ADTC's reasonable assessment of Western's proposed subcontracting arrangement.

Western also points to a statement by the contracting officer to the effect that "protester's proposal was not considered inadequate in its response to the interface requirements" and a remark in the cover letter accompanying the Air Force's report to our Office on the protest that "major technical deficiencies were found in the Western proposal, including * * * failure to describe required * * * interface requirements." The contracting officer's statement, read in context, refers to the technical interfacing of system components, whereas the cover letter remark concerns a failure to integrate managerially the various aspects of the program. We see no inconsistency here.

The RFP stressed the reliability and maintainability of the system as dual objectives of each offeror's proposed design. The storage container in these systems is basically a box containing a chain ladder, a conveyer belt-like apparatus resembling two bicycle chains joined by crossbars, on which the ammunition rounds are retained and on which they move to and from the mechanism interfacing with the gun. Western proposed the use of master links retained by spring clips to attach the crossbars in its chain ladder. ADTC considered this a deficiency because the use of spring clips reduced reliability more than it enhanced maintainability.

In its protest to ADTC, Western argued that no reduction in reliability attributable to the use of spring clips had been demonstrated, that this was an area for tradeoff studies during the course of the contract, and that it should not have been grounds for assessing a technical deficiency. ADTC's response was to advise Western that tests of a predecessor system had demonstrated a severe degradation of reliability when shifting from a system employing a minimum of spring locks to one employing 1,500 such master links; ADTC noted that Western proposed to use more than 2,300 spring locks.

In its protest to our Office, Western suggests first that the data from this prior test was furnished only to its competitors and, second, that ADTC improperly used this data as a basis for the technical disqualification of Western. We do not agree.

We note initially that while the data from these prior tests was not incorporated into the RFP, we believe that the results were, since paragraph 4.2.10 of the SOW states that: "During fabrication, minimum use will be made of snap rings, roll pins and spring locks." Western has provided no evidence that data from these prior tests was released to any of its competitors and, in the absence of such evidence, we attribute their acceptable treatment of this matter to the clear language in this section of the RFP. Furthermore, we regard Western's own disregard of the mandate of this section as a sound basis for assessment of a technical deficiency.

We have carefully examined the remainder of Western's allegations concerning the alleged deficiencies in the technical evaluation of its proposal. In each instance, we find substantial support for ADTC's position. As a result, we do not think that the record provides any basis upon which we might conclude that the ADTC's evaluation was unreasonable. Furthermore, we think the substantial number of deficiencies in Western's proposal would have necessitated a major rewrite and we therefore cannot disagree with ADTC's determination to exclude Western from the competitive range.

Two additional matters require comment. First, Western contends that its protest to ADTC of March 7 incorporated a detailed rebuttal of ADTC's evaluation which, in effect, cured the deficiencies in Western's proposal. Western objects to ADTC's failure to consider this information.

The additional information which Western submitted in its protest to ADTC amounts to an effort by Western to supplement or clarify its initial proposal and to initiate discussions with ADTC. No discussions are required with an offeror once its proposal is excluded from the competitive range. Techniarts, B-192158, March 29, 1979, 79-1 CPD 213; Engineering Research, Inc., B-192368, October 25, 1978, 78-2 CPD 302; Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153. We therefore see nothing improper in ADTC's failure to consider the information provided by Western in its protest to ADTC.

Second, Western also argues that the contract award was improper because it was accomplished during the pendency of Western's protest in contravention of 4 C.F.R. § 20.4 (1979). We note, however, that the contract was awarded in the interval between the denial of Western's protest to ADTC and the filing of Western's protest with our Office. Consequently, no protest was pending at the time of contract award.

The protest is denied in part and dismissed in part.


Deputy Comptroller General
of the United States